United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-6132

ORIGINAL

75-7132
To be argued
Thomas A. Shaw, Jr.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

75-7646

75-7668, 75-7132, 75-6140

GEORGE RIOS, et al.,

Plaintiffs-Appellants,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,

Defendants-Appellees.

B

P/S

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.S., et al.,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK WITH REGARD TO BACK PAY

BRIEF FOR DEFENDANT-APPELLEE MECHANICAL CONTRACTORS ASSOCIATION OF NEW YORK, INC.

Thomas A. Shaw, Jr.
Robert G. Kuhbach
Breed, Abbott & Morgan
One Chase Manhattan Plaza
New York, New York 10005

Attorneys for Defendant-Appellee,
Mechanical Contractors
Association of New York, Inc.

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UNITED STATES COURT OF APPEALS
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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, :

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-against- :

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- x Docket No. 75-6132

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Plaintiffs-Appellants, :

-against- :

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al., :

Defendants-Appellees. :

- x

BRIEF FOR DEFENDANT-APPELLEE MECHANICAL CONTRACTORS ASSOCIATION OF NEW YORK, INC.

ISSUE PRESENTED

Having found that plaintiffs had shown "no specific instances of MCA discrimination," did the District Court properly find MCA not liable for any award of back pay?

STATEMENT OF THE CASE

Appellee Mechanical Contractors Association of New York, Inc. ("MCA") has never been charged with any act of discrimination or other wrongdoing whatever by the Government. Rather, MCA was named as a defendant in the Government's complaint in this matter "for the purposes of relief only pursuant to Rule 19(a)(1) of the Federal Rules of Civil Procedure." (Gov't complt., para. 15; A-111).

Accordingly, the Government has not appealed from the refusal of the Court below (Bonsal, J.) to award either back pay or attorneys' fees as against MCA.

It is solely the Rios appellants ("Rios") who alleged acts of illegal discrimination by MCA. Judge Bonsal specifically found with respect to these allegations (A-618):

> "Plaintiffs have shown no specific instances of MCA discrimination."

Nevertheless, the Rios appellants have seen fit to appeal the denial of any back pay award against MCA, and to cross-appeal (after Local 638 had appealed) Judge Bonsal's award of $50,000 counsel fee insofar (among other objections) as he failed to make an award against MCA.

The Facts

MCA is a non-profit trade association which, at the time of trial, consisted of approximately 60 contractors in the business of installing heating, ventilating and air conditioning equipment in the New York City area. While its membership consists of most of the major HVAC contractors in the area, large numbers of steamfitter members of Local 638 are employed by some 240 other HVAC contractors in the area who are not members of MCA. MCA, of course, has never employed any steamfitters either for itself or for any of its member contractors who are responsible for their own hiring and firing. Nor was there any evidence remotely suggesting that MCA has ever had any influence over the admission of new members into Local 638. Accordingly, the Rios brief, in the portion of its Statement of the Facts directed particularly against MCA under the heading "Employment of Non-Whites" (pp. 17-19) attempts to cull evidence from the record of acts of discrimination on the part of some contractor employers and then to suggest that MCA would be liable for any such discrimination if the contractors were members of MCA. However, this portion of the Rios brief and particularly the portions

of the record cited do not establish proof of unlawful discrimination on the part of any particular employer or group of employers, and Judge Bonsal made no finding of fact or law of any such discrimination.

Beyond that, it is clear that even if discrimination had been proved on the part of a particular employer who happened to be a member of MCA, this would not establish any liability on the part of MCA except upon proof that it connived with the guilty employer in the discrimination. There was no evidence (and Rios does not attempt to cite any) which remotely established that MCA in any way promoted, connived at or even approved discrimination on the part of its members. On the contrary, all of the evidence concerning MCA went to the point that MCA, through its Executive Secretary, Joseph L. Hopkins, had sought by persuasion of its members to increase minority hiring. The problem, however, was that it had always been the accepted practice in the steamfitting industry generally in New York City that employment of steamfitters was limited to members of Local 638 or non-members who had a permit from Local 638 (A-500-1). Even so, for one memorable example, under Mr. Hopkins' leadership

and in cooperation with the Workers' Defense League, MCA members in the summer of 1971 hired 100 minority workers (A-161, finding #24).

This massive infusion of minority workers, as one Government witness readily conceded, was without parallel in any other industry in the construction trades in New York City (A-281). Later, on motion of the Government, and after the employers (all of whom were MCA members) of these and other minority workers had testified that they were working satisfactorily as construction steamfitters (A-161, finding #30) Judge Bonsal ordered Local 638 to admit 169 minority workers to full membership in its A Branch (337 F. Supp. 217 (S.D.N.Y. 1972)).

The short answer to the Rios unproved contention that individual employers may have been guilty of unlawful discrimination is that Rios did not choose to name any such employers as parties defendant and certainly established no factual basis for holding MCA liable for any such damages any such individual employers may have caused plaintiff class members. In the event that Rios has a valid claim against any particular employer, such claim may be asserted against such employer, not MCA.

As Judge Bonsal stated below in denying back pay as against MCA and JAC (400 F. Supp. at 992, n.4):

> "4. The decision herein is without prejudice to any claim a member of the plaintiff class may have against an employer (See Albermarle Paper Co. v. Moody, ___ U.S. ___, 95 S.Ct. 2362, 4 L.Ed.2d 280 (1975). Neither MCA nor JAC is an employer, and no employers are parties to this action."

The Rios brief also urges that MCA should have been held liable for damages by reason of discriminatory acts of the Joint Steamfitter Apprenticeship Committee ("JAC") which is the third named defendant.

The JAC is a joint labor management committee appointed by the Trustees of the Steamfitters' Industry Educational Fund (A-589, finding #11) to run the steamfitters apprentice program. The sole nexus between MCA and the JAC relied upon by Rios is that MCA had the right under the 1960 Declaration of Trust which created the Educational Fund to appoint half of the Trustees of the Fund who in turn appointed the members of the JAC (ibid.). However, there was no evidence that MCA, as such, "controlled" either the Trustees or the members of the JAC as Rios contends (Br., p. 39) without citation of any evidence other than the fact that Mr. Hopkins was a Trustee of the Educational

Fund and performed his duties as such. Under such circumstances, Judge Bonsal refused to make any finding that MCA controlled the JAC or was responsible or liable in damages for any discriminatory acts on the part of the JAC.

B. The Decision Of The Court Below With Respect To MCA

As already stated, Judge Bonsal did not find that MCA had committed any acts of unlawful discrimination as alleged by Rios. Rather, he found that MCA "has greater influence over and responsibility for employment practices applying to the industry as a whole than any single employer." Accordingly, Judge Bonsal continued in language which makes it clear that he regarded MCA as a proper party for the purpose of granting relief only (A-616, 360 F. Supp. at p. 995-6):

> "Moreover, the participation of MCA in an affirmative action program is a necessity if the steamfitting industry is to correct the discriminatory effects of past employment practices.
>
> Having found that MCA was properly made a party defendant in the Rios action, this Court, however, does not of course imply that MCA has been responsible ipso facto for all the employment practices here found unlawfully discriminatory or that it is liable in damages to the plaintiffs in Rios. Plaintiffs have shown no specific instances of

> MCA discrimination. Rather, plaintiffs have demonstrated only that there has been a lack of non-white employment in the industry generally and that, in consequence, the industry's referral practices must be changed. For the future, MCA will bear responsibility with Local 638 and JAC to take appropriate affirmative action to correct this situation."

Judge Bonsal's view of the role of MCA as a necessary party to any Affirmative Action Program was further made manifest at the first post-trial conference held before the Court on April 26, 1973 at which he stated on the record that he intended to include MCA in the Affirmative Action Program but did not intend to award any money damages against it as follows:

> "From the point of view of equitable relief only. This doesn't apply to any legal relief, but from the point of view of equitable relief.
>
> In other words, what I am trying to do here, really, is to work out a program which inevitably has got to involve you [MCA] and the unions and JAC . . . ." (Tr. , p. 19).

Later in this same conference, after having outlined the general scheme of the Judgment including the provision for appointment of an Administrator, the Court pointed out the importance of deciding on the name of the Administrator quickly and stated:

> "I was thinking over the people who testified at the preliminary injunction and the trial and the only one fellow, and I don't think he would be at all interested in it, would be Hopkins." (Tr., p. 40).

This reference to Mr. Hopkins as a possible Administrator of the Affirmative Action Program clearly indicates the Court's view of Mr. Hopkins and MCA as not being the party responsible for the unlawful employment practices involved in the case. Perhaps even more eloquent evidence of the blamelessness of MCA and Mr. Hopkins is the fact that The Recruitment and Training Program ("RTP"), an organization run by non-whites for the purpose of recruiting and training non-whites in the construction trades and which is named as a minority referral source in paragraph 11b of the Decree, also made an unsolicited recommendation of Mr. Hopkins for Administrator of the Affirmative Action Program. By letter dated June 4, 1973 to the U.S. Attorney, RTP had this to say about Mr. Hopkins in nominating him:

> "Joseph Hopkins, Secretary Mechanical Contractors Association, Inc. He has a long history of working toward placing minorities into the steamfitting industry. Mr. Hopkins was responsible for placing the first minority workers into both the A and B divisions of Local 638 as far back as 1966." (Conference of June 7, 1973; Tr., p. 167).

Finally, in his specific decisions below which are the subject matter of the present appeal, Judge Bonsal reiterated his previous findings in denying relief as against MCA.

In denying any award of back pay as against MCA Judge Bonsal said (400 F. Supp. at p. 992):

> "MCA.-Plaintiffs seek to have MCA share in the burden of providing back pay. MCA, a trade association of certain contractors in the New York area, acts only in collective bargaining negotiations between its members and Local 638. MCA does not employ steamfitters; rather, employment is done by its members. While MCA was found to have been properly made a party defendant in the Rios action (360 F. Supp. at 994-95), that finding did not imply that MCA was 'responsible ipso facto for all the employment practices here found unlawfully discriminatory or . . . liable in damages to the plaintiffs in Rios. Plaintiffs have shown no specific instances of MCA discrimination. Rather, plaintiffs have demonstrated only that there has been a lack of nonwhite employment in the industry generally and that, in consequence, the industry's referral practices must be changed.' id. at 995-96."

and on the attorneys' fees issue, Judge Bonsal said (400 F. Supp. at p. 997):

> "The only other defendants who might be called upon to pay the attorneys' fees are MCA and the JAC. However, MCA, a non-profit trade association of certain of the contractors in the New York area, primarily

acts for its employer members in collective bargaining negotiations with Local 638 and does not employ steamfitters directly. After trial, the Court found that MCA's status as a proper party did not imply that it was 'responsible ipso facto for all the employment practices . . . found unlawfully discriminatory or that it is liable in damages to the plaintiffs,' and found that plaintiffs had shown 'no specific instances of MCA discrimination.' 360 F. Supp. at 995."

ARGUMENT

MCA WAS PROPERLY HELD NOT LIABLE FOR BACK PAY

The basis for awarding back pay in a Title VII action (42 U.S.C. § 2000e et seq.) is statutory.

> "If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . ., the court may enjoin the respondent . . ., and order such affirmative action as may be appropriate, which may include . . . reinstatement or hiring of employees, with or without back pay (payable by the [party] responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate." (42 U.S.C. § 2000e-5(g); emphasis added).

The principles to be used in applying the statute to any particular situation are equitable. Under Title VII, "Congress took care to arm the courts with full equitable powers . . . to 'secur[e] complete justice' . . . ." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). See also Franks v. Bowman Transportation Co., Inc., 44 U.S.L.W. 4356, 4360-61 (1976).

The standard to be used in awarding back pay as well as in reviewing that award, is as follows:

> ". . . given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The courts of appeals must maintain a consistent and principled application of the back pay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases.
>
> * * *
>
> ". . . the standard of review will be the familiar one of whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case, Langnes v. Green, 282 U.S. 531, 541 (1931)." Albemarle Paper Co. v. Moody, 422 U.S. 405, 421, 424-25 (1975).

Applying these principles, this Court in its most recent decision in a Title VII case recognized the wide discretion granted to the district courts to fashion an appropriate remedy.

> "42 U.S.C. § 2000e-5(g) specifically gives authority to the district courts to order any 'affirmative action' which 'may be appropriate' to remedy past discrimination. Section 2000e-5(g) expressly states that the scope of the district courts' remedies for employment violations is to be 'equitable,'

> which is to say, broadly discretionary." EEOC v. Local 638 . . . Local 28, Sheet Metal Workers, et al., ___ F.2d ___, Slip Op. 2481, 2491 (2d Cir. March 8, 1976).

See also Patterson v. Newspaper & Mail Deliveries Union of N.Y. & Vic., 514 F.2d 767, 776 (2d Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3069 (U.S. July 28, 1975) (No. 155); Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622, 629 (2d Cir. 1974); United States v. Wood, Wire and Metal Lathers International Union, Local 46, 471 F.2d 408, 413 (2d Cir.), cert. den., 412 U.S. 939 (1973).

Judge Bonsal, in awarding back pay was fully cognizant of, and indeed cited and relied upon, Albemarle Paper, supra, and the scope of his authority:

> "Thus, the statute grants wide discretion to award back pay when warranted by the circumstances of the case and a court must make such determinations on a case-by-case basis [cites omitted]. Cases which hold that an award of back pay is required by Title VII 'unless special circumstances would render such an award unjust' also require a case-by-case analysis [cites omitted].
>
> "In making awards for back pay, all the circumstances of the case, including ability to pay, must be taken into account [cites omitted]." 400 F. Supp. at 991.

On the basis of this standard, together with his knowledge of all of the relevant facts, Judge Bonsal refused to hold MCA liable for back pay. His reasoning, as quoted

above, was simply that MCA had not participated in any acts of discrimination and should, therefore, be liable for none of the monetary damages awarded.

The statutory basis for the District Court's finding that only Local 638 is liable for back pay, is of course the provision of § 2000e-5(g), quoted supra, that back pay is "payable by the [party] responsible for the unlawful employment practice."

The Rios response to Judge Bonsal's findings of fact with respect to MCA is, in fact, a request to this Court to overturn them and to substitute a finding of fact that MCA was proved to be guilty of the unlawful discrimination complained of. As the discussion of the evidence supra has demonstrated, there is no basis whatever for any such action on the part of this Court, much less is there a basis for setting aside Judge Bonsal's findings, especially after giving due regard to the opportunity of the trial court to judge the creditability of the witnesses, as "clearly erroneous." Rule 52, F.R.C.P. The circumstance of MCA in the present case is directly paralleled by that of the defendant Contractors' Association in Local 28, Sheet Metal Workers, supra. There, as this

Court said (Slip Op., p. 2484, n.3):

> "There is no claim here that the Contractors' Association has engaged in discriminatory employment policies. The Association is a party only for the purposes of relief and because, under the standards of Rule 19(a), Fed. R. Civ. P., the Contractors' Association is an indispensable party."*

Similarly here, the Government makes no claim that MCA was guilty of discriminatory employment practices, and although Rios did make such claims, Judge Bonsal rejected them. However, Judge Bonsal also found that "the participation of MCA in an affirmative action program is a necessity if the steamfitting industry is to correct the discriminatory effects of past employment practices." 360 F. Supp. at p. 995.

Neither the District Court nor this Court imposed any liability for back pay upon the Sheet Metal Contractors' Association although the Sheet Metal joint apprenticeship committee was described by this Court as "a body of three representatives from Local 28 and the Contractors' Association

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*Rule 19(a), F.R.C.P. requires in relevant part the joinder of a party "if (1) in his absence complete relief cannot be accorded among those already parties."

which oversees the training program for sheet metal workers" and, unlike the steamfitters' JAC, had a long history of adjudicated discrimination. So here, the mere fact that MCA appoints half of the Trustees of the Educational Fund, who in turn appoint the members of the steamfitters' JAC, is not a ground for holding MCA liable for any back pay. Despite Rios' contentions to the contrary, and as more fully discussed supra, there was no evidence that MCA controlled the actions of the JAC, and Judge Bonsal declined to make any such finding.

The Fifth Circuit has recognized in a Title VII case that "apportionment of the responsibility for equitable relief in a case such as this one falls within the sound discretion of the district court," which has "wide latitude . . . to contour the remedy to the equities of the case," Guerra v. Manchester Terminal Corp., 498 F.2d 641, 655 (5th Cir. 1974), and that "distribution of the back pay award" is to be made by the District Court in accordance with "principles of equity." Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1382 (5th Cir. 1974).

In Guerra, supra, the District Court awarded

plaintiff a joint and several judgment against all three defendants -- the employer (N.B. not an employer association), the local union and the international union, but granted the employer a judgment against the two unions for any portion of back pay which it might have to pay. In affirming the District Court's apportionment of liability, the Fifth Circuit stated:

> "We do not mean to intimate that all of the dirt in this case is to be found on union hands. The district court certainly did not think so, and we agree that the employer, too, violated the statute. Nor do we mean to suggest that employers can avoid paying for their civil rights violations by standing passively by as unions take the active role. We say only that because the undisputed facts of this case identify the unions, particularly the Local, as those principally responsible for plaintiff's loss of the Dock job, the district judge did not abuse his discretion in placing final responsibility for the monetary recovery at the feet of [the unions]." (498 F.2d 641, 656).

In United States v. United States Steel Corporation, 371 F. Supp. 1045, (N.D. Ala. 1973), aff'd 520 F.2d 1043 (5th Cir. 1975), the District Court held the employee and local union liable for back pay, but not the international union:

> "The international union was not really responsible for the practices giving rise to the three back-pay awards.

> It should, moreover, be noted that the international has taken a strong role of leadership, not always without disagreement from the locals, in pushing non-discriminatory policies." (Footnote 39, 371 F. Supp. at p. 1060).

This aspect of the District Court's decision was specifically upheld on appeal (520 F.2d 1043, 1060).

Moreover, Rios fails to cite a single Title VII decision in which an employer association has been held liable for back pay, and we have found none. Instead, Rios relies upon cases interpreting the National Labor Relations Act (the "NLRA") which are either inapposite or distinguishable on their facts. In NLRB v. E. F. Shuck Construction Co., 243 F.2d 519 (9th Cir. 1957), the employer (not an employer association) and the union involved admitted liability. In NLRB v. Waterfront Employers of Washington, 211 F.2d 946 (9th Cir. 1954), the employers' association was held liable for an unfair labor practice in part because it acted as the paymaster for all of the employers and operated the hiring hall. In Williams v. New Orleans Steamship Assoc., 341 F. Supp. 613 (E.D.La. 1972), the employer association owned and operated the hiring hall; the District Court merely denied the defendants' various motions - no liability was determined.

Since plaintiffs have chosen to rely heavily on cases involving the NLRA, we would point to another such case where the National Labor Relations Board's award of back pay against both the union and the employer in an unfair labor practice case was modified on appeal by this Court, which held that the employer should not be liable for any back pay, leaving the union solely liable. Confectionary & Tobacco Drivers & Warehousemen's Union, Local 805 v. NLRB, 312 F.2d 108 (2d Cir. 1963). The reason for this Court's modification of the Board's order was that it found no evidence of the employer's complicity with the union in engaging in unfair labor practices (312 F.2d 108, 115-116). Similarly here, the District Court found no evidence of the MCA's participation in Local 638's discriminatory conduct and had therefore a reasonable basis for charging back pay against Local 638 alone, and not against the MCA.

CONCLUSION

We submit that the Court below did not impose liability for back pay upon MCA because it found an absence of evidence that MCA was the party "responsible

for the unlawful employment practice," and that in so doing, it was clearly correct and should be affirmed.

Respectfully submitted,

BREED, ABBOTT & MORGAN
Attorneys for Defendant-Appellee
Mechanical Contractors Association
of New York, Inc.
Office and P.O. Address
One Chase Manhattan Plaza
New York, New York 10005
(212) 944-4800

Thomas A. Shaw, Jr.,
Robert G. Kuhbach,

Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Plaintiffs-Appellants,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U. A., et al.,

Defendants-Appellees

- -x

AFFIDAVIT OF SERVICE ON PERSON IN CHARGE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MORRIS ARNSTEIN, being duly sworn, says: I am employed in the office of Breed, Abbott & Morgan, 1 Chase Manhattan Plaza, New York, N.Y. 10005, attorneys for the Mechanical Contractors Associationin the above action.

On the 2nd day of April, , 1976, between the hours of 9:30 A.M. and 5:30 P.M., I served the annexed

BRIEFS OF APPELLEES

on the attorney(s) listed below by delivering the same to and leaving the same with the person in charge of said office(s).

Tufo, Johnston & Allegaert, Esqs., 645 Madison Avenue, New York, N. Y. 10022

Sworn to before me this
2nd day of April 1976

Donald P. Price

DONALD P. PRICE
NOTARY PUBLIC, State of New York
No. 8439300
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1978

Morris Arnstein

UNITED STATES COURT OF APPEALS
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ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,

Defendants-Appellees

etc.

- -x

AFFIDAVIT OF SERVICE ON PERSON IN CHARGE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ELIZABETH M. FINLEY, being duly sworn, says: I am employed in the office of Breed, Abbott & Morgan, 1 Chase Manhattan Plaza, New York, N.Y. 10005, attorneys for the defendant-appellee Mechanical Contractors in the above action.

On the 2nd day of April, 1976, between the hours of 9:30 A.M. and 5:30 P.M., I served the annexed

BRIEFS OF APPELLEES

on the attorney(s) listed below by delivering the same to and leaving the same with the person in charge of said office(s).

Steven J. Glassman, Esq., U. S. Attorney, St. Andrews Place, New York, N. Y.

Sworn to before me this
2nd day of April, 19 76

Donald [illegible]
NOTARY PUBLIC, State of New York
No. 24-[illegible]
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1978

Elizabeth M. Finley

Elizabeth M. Finley